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No. 95-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

v.

JOHNNY DUPREE, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Does *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed. 2d 691 (1991) require a § 5 jurisdiction to "identify" "unambiguously" a law being repealed, when the Code of Federal Regulations in effect at the time of the submission allowed entire acts to be submitted without specific identification of the repealed statutes being changed?

2. Whether, if the United States Attorney General can partially grant preclearance to portions of a statute submitted in its entirety, the burden then shifts to the United States Attorney General to identify unambiguously those portions of a voting change to which she objects, following *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) as to requirements regarding burden of proof shifts in a remedial statute?

3. Whether a municipal school board possesses standing under § 5 of the Voting Rights Act to enjoin a state statute in the situation where the vote dilution requisite, the only "change affecting voting" for § 5 jurisdiction, is created by the municipal school district's attempt to utilize the Voting Rights Act in this action to expand its boundaries into a predominantly white area, thereby diluting existing black voting strength within the school district?

4. Did the three-judge district court err in construing its duties under § 5 of the Voting Rights Act when it refused to accept evidence and address a remedy that would affect voting?

QUESTIONS PRESENTED FOR REVIEW – Continued

5. Whether, or to what extent, must a federal three-judge court (1) give deference to a prior state supreme court ruling in an identical case construing § 5 of the Voting Rights Act, particularly in light of the ruling in *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) on § 2 of the Voting Rights Act, and (2) be bound by the state supreme court's construction of a previously precleared statute as a matter of state law?

6. Given (1) that the appointment (as opposed to the election) of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of a one person, one vote inquiry, (2) that a city has been held warranted under the Fourteenth Amendment in extending boundaries for certain purposes without assuming responsibility for all public functions, and (3) that *Milliken v. Bradley*, 418 U.S. 717 (1974), generally has prevented equal protection challenges from being raised across district lines, can the United States Justice Department claim § 5 statutory coverage under the Voting Rights Act for a change affecting solely district boundaries for appointed school board members, particularly after *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

7. Are the challenged provisions of Mississippi's Uniform School Law of 1986 subject to preclearance procedures of § 5 of the Voting Rights Act when the law affects district boundaries of appointed school board members only, and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah*

QUESTIONS PRESENTED FOR REVIEW – Continued

County Com'n, 502 U.S. 377, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)?

8. Whether the All Writs Act grants a three-judge court jurisdiction to enjoin the operation of precleared § 52 of the Mississippi Uniform School Law?

9. Whether the remedy for failure of preclearance is one that affects voting as opposed to ceding geographic territory, students, tax bases and tax revenues to adjoining urban school districts?

PARTIES TO PROCEEDINGS BELOW

The parties in the Court below were:

Plaintiffs: Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos, individually and in their official capacities as then members of the Board of Trustees of the Hattiesburg Public School District. Current Hattiesburg Board of Trustee members are Dr. Joe Paul, Roger McDowell, Daisy Thorne, Sam Buchanan and Warren G. Hood. None is a member of a minority group.

Defendants: Mike Moore, in his capacity as Attorney General of the State of Mississippi, and the State of Mississippi are Defendants in this action. Ray Mabus, in his capacity as Governor of the State of Mississippi was dismissed from this action, accordingly his successor is not substituted as a party defendant.

Defendants/Intervenors: (1) The Lamar County Board of Education and Trustees, in their official capacities. At the time the action was filed, the members of the Lamar County Board were Charles L. Cameron, Rita Downs, Tommy Graham, Freddie G. Howell and Dr. Johnny R. Purvis. James Siders has replaced Stephen High who replaced Rita Downs on the Board. Fred Boudreaux has replaced Dr. Johnny R. Purvis on the Board. Robert P. Sandifer has replaced Charles L. Cameron on the Board. (2) Forrest County School District and Members of its Board of Trustees, in their official capacities. At the time the action was filed, the members of the Forrest County School Board were Bobby Patrick, Frank Myers, Mike Gilpin, John E. Clark and W. Larry Thompson.

PARTIES TO PROCEEDINGS BELOW – Continued

Current members of the Forrest County School Board are Mike Gilpin, Frank Myers, John E. Clark, John Pilot Lee and Terry Ryals.

Amicus Curiae: The United States of America has participated as amicus curiae to this proceeding since March 25, 1991.

The Plaintiffs in the Court below are the Appellees in this Court. The Appellants in this Court are the Defendants and the Defendants/Intervenors with the exception of Ray Mabus, former Governor of Mississippi, who was dismissed by the three-judge district court and is not a party to this appeal.

This Jurisdictional Statement is filed on behalf of The Lamar County Board of Education and Trustees in their official capacities. The Forrest County School District and Members of its Board of Trustees, in their official capacities, and Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi, are filing a separate jurisdictional statement and appendix, in which the Lamar County Board of Education also joins.

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INTRODUCTION

After the Supreme Court directed to the Solicitor General the question: (1) "In light of Mississippi Supreme Court's holding in *Greenville Public School District v. Western Line Consolidated School District*, 575 So. 2d 956 (Miss. 1991), that Miss. Code Ann. Sec. 37-7-103 (1972 & Supp. 1990) supersedes Miss. Code Ann. Sec. 37-7-611 (1972) and repeals it by implication, what remedy, if any, can a federal court offer for failure to preclear Section 47 of the Education Reform Act, 1986 Miss. Gen. Laws ch. 492, which also reported to repeal Sec. 37-7-611?" and directed to the three judge court below the question: (2) "Whether it [the three-judge district court] has enjoined only Section 47 of the Uniform School law, 1986 Miss. Gen. Laws Ch. 492, or whether it has also enjoined the effect of Section 52 of the Act (codified as Miss. Code Ann. § 37-7-103 (1972 and Supp. 1990)), insofar as Section 52 implicitly repealed Miss. Code Ann. § 37-7-611 (1972)?", the three-judge court enjoined Section 52, as well as § 47, of the Mississippi Uniform School Law of 1986.

OPINION BELOW

Dupree v. Mabus, 776 F. Supp. 290 (S.D.Miss. 1991), *(Dupree I), vacated and remanded, Dupree v. Moore*, 503 U.S. 930, 112 S.Ct. 1462, 117 L.Ed.2d 609, 60 U.S.L.W. 3651 (1992), *on remand, Dupree v. Moore*, 831 F. Supp. 1310 (S.D.Miss. 1993), *appeal dismissed, Moore v. Dupree*, 114 S.Ct. 872, 127 L.Ed.2d 69, 62 U.S.L.W. 3470 (U.S. 1994), *later proceeding, Moore v. Dupree*, 115 S.Ct. 1684, 130 L.Ed.2d 550, 63 U.S.L.W. 3311 (1994), *vacated and remanded, Moore v.*

Dupree, 11 S.Ct. 1684, 131 L.Ed.2d 550, 63 U.S.L.W. 3753 (1995).

JURISDICTION

The District Court's Order denying the Appellants' Joint Motion for New Trial or to Alter and Amend Judgment was entered on February 8, 1996 (Appendix B). An Amended Notice of Appeal was filed on February 20, 1996 (Appendix Q). The District Court's Final Judgment from which Appellants sought relief in said motion was entered on January 9, 1996 (Appendix K). The original Notice of Appeal with regard to said Final Judgment was filed on February 8, 1996 (Appendix R). The Court has jurisdiction of this appeal pursuant to 42 U.S.C. § 1973c, 28 U.S.C. § 1253, 28 U.S.C. § 2101 and 28 U.S.C. § 2106.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1973c

This statute is reprinted in App. N, at 88a.

28 C.F.R. § 51.25 (1986)

This regulation is reprinted in App. O, at 90a.

28 C.F.R § 51.35 (1986)

This regulation is reprinted in App. P, at 92a.

Miss. Code Ann. § 37-7-611 (1972)

This statute is reprinted in App. L, at 84a.

Miss. Code Ann. § 37-7-103 (1972 and Supp. 1990)

This statute is reprinted in App. M, at 87a.

STATEMENT OF THE CASE

This case arises from the enactment by the State of Mississippi of a comprehensive revision to its education laws, embodied in the Education Reform Act called the Uniform School Law of 1986. (App. X, p. 128a). One section, § 47 of the Uniform School Law, repealed a former provision, § 37-7-611 (App. L, p. 84a), which governed the modification of school district boundaries when territory is annexed by a city. Section 37-7-611 had held that an urban school district's geographic boundaries were coterminous with city limits. Annexations by cities therefore automatically expanded school boundaries. Another section, § 52 of the Uniform School Law, amended Miss. Code Ann. § 37-7-103 (1972) (App. M, p. 87a) to give the board of each school district the authority to control the geographic boundaries of the school district. Section 52 provides that a school district may move its geographic boundaries into a neighboring district only with the consent of the neighboring district. It is uncontested that § 52 of the Uniform School Law was precleared under § 5 of the Voting Rights Act. Both these sections have now been enjoined by the three-judge district court convened pursuant to § 5.

Prior law under § 37-7-611 had provided that when a city annexed territory, the municipal school district automatically expanded to become coextensive with the newly created city limits. The repeal of § 37-7-611 under

the Uniform School Law would end the automatic expansion of school district territories to municipal boundaries upon annexation. The method of expanding a school district into neighboring territory would then reasonably be governed by § 52 of the Uniform School Law, which required the consent of the neighboring school board before the expansion of a school district corresponding to a city's expansion would take place.

28 C.F.R. § 51.27(b) (1987) now provides that a copy of any repealed statute should be included with a § 5 submission of the repealing legislation. That specific regulation was not in effect at the time of Mississippi's submission of the Uniform School Law of 1986.

On July 22, 1986, the State of Mississippi identified the Uniform School Law to the United States Department of Justice for preclearance under § 5 by submitting that "Mississippi Uniform School Law of 1986 . . . is submitted . . . in its entirety," and, again, that "the complete act is submitted for review." (App. X, p. 131a).

On August 29, 1986, the Justice Department represented that it did "not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986) [the Uniform School Law] as identified in your July 22, 1986, letter." (App. Z, p. 203a).

On March 31, 1989, the Justice Department interposed an objection to § 47, the repealer of § 37-7-611. (App. DD, p. 230a) (specifically noting that, "we recognize that demographic patterns are not uniform throughout the state . . . ", p. 231a). After the State asked for

reconsideration, (App. EE, p. 234a) the Justice Department again determined it would not withdraw the objection by its letter of May 25, 1990 (App. FF, p. 264a) arguing that the Justice Department should not have the responsibility of uncovering prospective voting changes "of which the state itself seemingly was unaware at the time the prior submissions were made." (App. FF, p. 266a).

This civil action commenced on February 23, 1990, when the members of the Hattiesburg School District, individually and in their official capacities, filed suit against the Governor and Attorney General of the State of Mississippi. The City of Hattiesburg, within which the plaintiffs'-appellees' school district is located, had enjoyed a series of annexations into adjoining counties in 1966, 1979, 1981, 1982, 1985 and 1989. All annexations that affected voting (except one[1]) in the City of Hattiesburg had been precleared under § 5 of the Voting Rights Act.

While this case was pending, and before any ruling was issued in the instant case, the Mississippi Supreme Court determined that it had concurrent jurisdiction with the local three-judge federal district court and held that § 47, the repealer of § 37-7-611, had been precleared pursuant to § 5 of the Voting Rights Act and further held that § 52 of the Uniform School Law was "a subsequent enactment covering a field of operation co-existent with

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[1] The 1966 annexation into Lamar County was never precleared by the United States Justice Department. The 1966 annexation is the only Lamar County area sending children to school in Hattiesburg.

[Section 37-7-611]" that "cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts." These judgments by the State Supreme Court were dismissed without discussion by the three-judge federal court in *Dupree II* by the single sentence footnote 10: "Hence, this court does not find persuasive the holding in *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1991), *cert. denied*, 502 U.S. 950, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), which held that the Attorney General had in effect precleared the repeal of Section 37-7-611 when he precleared Section 52." (App. E, p. 59a).

On April 17, 1995, the Court vacated and remanded *Dupree II* with directions for the District Court to address the following issues: " . . . to clarify whether it (the three-judge district court) has enjoined only Section 47 of the Uniform School Law, 1986 Miss. Gen. Laws ch. 492, or whether it (the three-judge district court) has also enjoined the effect of Section 52 of the Act (codified as Miss. Code Ann. Section 37-7-103 (1972 & Supp. 1990)), insofar as Section 52 implicitly repealed Miss. Code Ann. Section 37-7-611 (1972)." The three-judge district court held that although § 52 had been precleared, its operation and effect would be enjoined by the All Writs Act. The Court again overruled[2] motions of the Forrest County and Lamar County School Districts requesting the Court to address whether its remedy would affect voting in school district elections and/or geographic territory by

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[2] Identical motions were overruled after *Dupree I* (App. G, p. 76a) and *Dupree II* (App. I, p. 79a).

ordering the Hattiesburg School District boundaries moved to the city's urban limits, thereby absorbing students, tax base, and tax revenues.

The Justice Department had concluded that repealing the automatic school district annexation provisions of § 37-7-611 would be "likely to create a class of city voters (for the most part predominately white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." (App. DD, p. 232a). The Justice Department also noted that the State of Mississippi had provided "no explanation for the establishment of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently from white voters." (App. DD, p. 232a).

There have been no evidentiary hearings below. The case was disposed of on summary judgment when the three-judge district court held that enforcement of the repealer of § 37-7-611 was enjoined and denied the appellant school districts' motion to fashion a remedy.

ARGUMENT

SHOULD THE THREE-JUDGE COURT BELOW HAVE GIVEN DEFERENCE TO THE MISSISSIPPI SUPREME COURT?

Growe v. Emison, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), held that the state's instrumental role in redistricting inheres in the judicial branch as well as

the legislature. "Minnesota can have only one set of legislative districts, and the primacy of the state in designing those districts compels the federal courts to defer." *Id.*, at 122 L.Ed.2d 400.

Here, during the pendency of this case, the Mississippi Supreme Court decided in *Greenville Public School Dist., et al. v. Western Line Consol. School Dist., et al.*, 575 So.2d 956 (Miss. 1991), *cert. denied*, 502 U.S. 950, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), that § 47 had been precleared and that if § 47 had not been specifically precleared, it had been precleared by implication. The Mississippi Supreme Court then construed state law, holding that § 52 which was precleared,[3] was in conflict with § 47 and, due to rules of statutory construction, § 52 would prevail.

The Mississippi State Supreme Court applied common views of statutory construction, citing only *Sutherland on Statutory Construction*, basic hornbook law, for the proposition that the Uniform School Law's precleared provisions, coming later in time than the earlier § 37-7-611, were precleared by implication when the later enactment was both passed as part of Mississippi law and precleared by the United States Attorney General.

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[3] Section 52 was among the 13 express submissions of the State of Mississippi specifically identified in the submission of the Uniform School Law of 1986 to which the United States Attorney General specifically entered no objection. (App. Z, p. 203a, referencing App. X, at p. 133a). Since Section 52, mandating consent by all school districts before school boundaries can change, was precleared, the more specific Section 47, applying only in municipal annexations, must have been precleared.

If this Court is to overturn a state supreme court determination of federal voting rights, it should not do so in a manner which conflicts with generally accepted state common law. What is being overturned is not some racist anomaly of a single state's class or race based animus. Mississippi is not relying on a state poll tax or some other discredited vehicle of racism to oppose the federal court § 5 interpretation. What is involved here is as basic a principle as can be enunciated in the law. A later statute, § 52, controls an earlier one, § 37-7-611.

Ruling contrary to the decision in *Greenville v. Western Line* puts the federal court's jurisprudence in conflict with state law in at least three areas: (1) the force to be given statutory construction, (2) the extent to which the federal courts under § 5 may address state equity concerns upon annexation, and, (3) whether the Mississippi Supreme Court is empowered to decide § 5 issues, at least insofar as applying state law.

Last term, the United States Supreme Court identified as an open question whether or not a state court must undertake jurisdiction in the context of another civil rights statute, § 1983. Though uncertain whether a state court *must* undertake such causes of action, it is clear that the state court *may* assume jurisdiction. It will be presumed that state courts may hear and decide violations of federal law under the Supremacy Clause. If the state courts do undertake that litigation, their decisions are binding: "When they have jurisdiction, state courts have been compelled to provide federal remedies." *National*

Private Truck Council, Inc. v. Oklahoma Tax Commission, ___ U.S. ___, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995).[4]

Hathorn v. Lovorn, 457 U.S. 255 (1982) previously discussed the intersection of state and federal authority in § 5 issues.[5] Prior cases discussing *Hathorn v. Lovorn* have, to the extent the issue has been raised at all, read that case to mean that there is concurrent jurisdiction within the state courts over § 5 of the Voting Rights Act. That was the ruling of the three-judge district court as to concurrent jurisdiction in *Dupree I*, 776 F. Supp. 290, at 298. Such a reading is supported by the clear language of *Hathorn*: "Accordingly, we hold that the Mississippi courts had the power to decide whether Section 5 applied to the change sought by respondents. If the Mississippi courts had the power to make this determination, then it is clear that they also had the duty to do so. 'State courts, like federal courts, have a constitutional obligation . . . to uphold federal law'." 457 U.S. 255, 269. As the *Hathorn* dissent states, "From a practical point of view, I think the

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[4] *National Private Truck* was a state tax case. The § 5 injunction here presented will impact on the tax base and elements of fiscal survival for the Lamar County Schools.

[5] In *Hathorn v. Lovorn*, 457 U.S. 255, 269 n.23 (1982) the Court stated: "[p]ersons dissatisfied with a state court's . . . resolution of a Section 5 issue in proceedings involving other parties . . . are likely to be able to litigate the issue anew in federal court." *Hathorn* did not discuss the possibility of, for example, collusive suits being brought in a chosen forum to obtain a chosen result. An issue of collusiveness with voting rights implications was presented in *LULAC v. Clements*, 999 F.2d 831 (5th Cir. en banc 1993) *cert. denied, LULAC v. Attorney General*, ___ U.S. ___, 114 S.Ct. 878, 127 L.Ed.2d 74 (1994).

Court's decision is bound to breed conflicts between the state courts and the federal district courts sitting within the States . . . " 457 U.S. 255, 271 (Rehnquist, J. dissenting). There is an unavoidable conflict between the state law[6] precedent of *Greenville*, the federal court rulings in *Dupree II*, and the current ruling in *Dupree III* that, effectively, § 52 was not rendered enforceable by preclearance.[7]

Federalism and the "slim judicial competence to draw district lines" weigh heavily against judicial intervention in voting decisions. *Miller v. Johnson*, ___ U.S. ___, ___, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). These duties belong to the State through its legislature or other body, rather than a federal court. 115 S.Ct. 2488, *citing Growe v. Emison*, 507 U.S. 25 (1993) and *Chapman v. Meier*, 420 U.S.

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[6] If the rulings of *Greenville, Mississippi* are construed as a matter of state law, recent pronouncements from the United States Supreme Court would seem to make it clear that the state construction would control, *e.g.*, "In construing the . . . ordinance, we are bound by the construction given it by the Minnesota court" *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992).

[7] If the Voting Rights Act did fall exclusively into federal law its results would be controlled as a matter of federal law. *E.g., D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (exclusive jurisdiction). If to the contrary, the Voting Rights Act could be decided based on statutory construction from state law or annexation principles from state law then its result would be controlled as a matter of state law. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). When a federal act may be applied by the state courts as equally competent in jurisdiction and with equal power to enforce its interpretations under that act, then the potential conflict, and resulting crisis in comity and federalism, necessarily result, *E.g. Private Truck, supra.*

1, 27 (1975). "The Constitution itself allocates this responsibility to States. U.S. Const., Art. I, § 2, *Growe v. Emison*," *Id.*

This Court should consider whether the ruling of a state supreme court on a federal § 5 question is binding.

CAN A FEDERAL COURT, UNDER § 5 OF THE VOTING RIGHTS ACT, ENJOIN AN OTHERWISE PRECLEARED VALID STATE STATUTE WHICH CONFLICTS WITH BUT SUPERSEDES A STATUTE PURPORTEDLY ENJOINED BECAUSE NOT PRECLEARED?

The three-judge district court below enjoined "the effect" of § 52 of the Uniform School Law, not under § 5 of the Voting Rights Act, but under the All Writs Act. This ruling is startling, and unprecedented.

The All Writs Act could have been used to reach the opposite conclusion, that, since § 52 had been precleared, the conflicting provisions of § 47 would be declared precleared under the All Writs Act. This was the result reached by the Mississippi Supreme Court under *Greenville v. Western Line*, except that the State Supreme Court relied upon general principles of statutory construction instead of the generally unprincipled All Writs Act.

The All Writs Act, 28 U.S.C. § 1651, provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The All Writs Act "provide[s] a federal court with various common law equity devices to be used incidental to the authority conferred on the court by rule or statute," but only "with

those writs necessary to the preservation or exercise of its subject matter jurisdiction." *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978) (citation omitted). As the Supreme Court has emphasized, "although the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 43, 106 S.Ct. 355, 361, 88 L.Ed.2d 189 (1985).

In this case, the actions taken by the district court are not indispensable in reaching a disposition of the case. The opposite disposition reached by the Mississippi Supreme Court is justifiable under basic tenants of statutory construction without reaching for authority under the All Writs Act. It is unclear how the three-judge court, which has limited authority to act under the auspices of § 5 of the Voting Rights Act, may use the All Writs Act to protect, or extend, its jurisdiction. Accordingly, it is a substantial question whether the All Writs Act can be used to justify the challenged injunction.

The principles of *res judicata* and the spirit of the Anti-Injunction Act, 28 U.S.C. 2283, may well be violated by the three-judge court's injunction, *cf. Wesch v. Folsom*, 6 F.3d 1465 (11th Cir. 1993); *Puerto Rican Legal Defense and Education Fund v. Gantt*, 796 F. Supp. 677 (E.D.N.Y. 1992) (three-judge court); *Roe v. Mobile County Appointment Board, State of Alabama*, ___ So.2d ___, 1995 Ala. LEXIS 128 (Ala. 1995) and *see also, Members of the Calif. Democratic Cong. Delegation v. Eu*, 790 F. Supp. 925 (N.D.Cal. 1992)

(federal court abstained in favor of state final judgment redistricting the entire state), *rev'd on other grounds and remanded sub nom. Benavides v. Eu*, 34 F.3d 825 (9th Cir. 1994); *Cotlow v. Emison*, 502 U.S. 1022, 112 S.Ct. 855, 116 L.Ed.2d 761 (1992) (vacating order of three-judge court enjoining state court proceedings where state court was on eve of issuing final judgment and where case involved disputed questions of state constitutional law), *appeal dismissed*, 502 U.S. 1068, *later proceedings sub nom., Growe v. Emison*, 507 U.S. 25, 122 L.Ed.2d 388, 113 S.Ct. 1075 (1993).

This Court should accept review concerning the scope of the valid application of the All Writs Act and whether a precleared State statute can be enjoined by a federal court, pursuant to the All Writs Act or any other rule of statutory construction.

A § 5 DECISION MUST ADDRESS THE REMEDY TO BE IMPOSED.

What is the remedy if the issue of the voting change really does implicate the boundary expansions of a city school district? It will necessarily be part of a § 5 District Court's responsibility to make a realistic assessment of the material changes in the management of a school district upon the annexation of territory, all those changes which are now part of the analysis used in state courts for evaluating the equities involved in an annexation issue.

The Uniform School Law was intended to work as a whole. For example, the injunction against § 52, codified as 37-7-103, leaves in place § 37-3-105, which sets forth the process to use in instances of alteration of school district boundaries. Among the steps to be taken under

37-7-105 is a requirement for preclearance under § 5. Also required are steps for notice and referendum and approval by the State Board of Education. All of these processes, required under State law, must be superseded by the three-judge district court's injunction, but in order to do so, § 37-7-105 must be enjoined as well. Alternatively, the version of § 37-7-103 that predated the Education Reform Act may be reinstated. If so, another conundrum is created, because the former law vested decision-making authority solely in the county school district, not the municipal district. Reverting to the former law places the duty to dissolve itself or alter its boundaries on the Lamar County School Board.

The previous 37-7-103 does not provide the mechanism by which bonds, debts, obligations, taxes, payrolls, teacher retention procedures, and other administrative duties are to be transferred to the new school district. Also among the problems created is the re-definition of the Lamar County School District as a consolidated, rather than a county-wide, school district. The Uniform School Law treats these distinctions as significant as to the types of administrative procedures required, and also, significantly, as determinative of the types of electoral process to be employed. The injunction against § 52, therefore, creates at least two new changes affecting voting: (1) the required opportunity for a referendum under 37-7-105 (or lack thereof if old 37-7-103 is employed) and (2) the change in voting that results to the Lamar County School District when it becomes the Lamar County Consolidated School District.

In addition to the collision with *Greenville Public School District, et al. v. Western Line Consolidated School*

District, 575 So.2d 956 (Miss. 1991), *cert. denied*, 502 U.S. 950 (1992), now that § 52 is enjoined, another collision occurs with *CIVIC v. Wayne County Board of Education*, 574 So.2d 619 (Miss. 1990). That decision from the Mississippi Supreme Court interpreted the Uniform School Law of 1986, particularly §§ 37-7-103 and 37-7-105. It held that 37-7-103 (that is, § 52 here enjoined) must be read together with §§ 37-7-105, 37-7-107, 37-7-109, 37-7-111, 37-7-113, and 37-7-115, as well as §§ 37-6-3(2) (Supp. 1990), 37-6-3 (Supp. 1989) (types of school districts) and 37-7-203 (Supp. 1989) (selection, term and qualifications of trustees of municipal separate school districts) and 37-7-207 (Supp. 1989) (selection and term of trustees of consolidated districts).

Additional practical problems come into play. The parties do not know what time frame to employ in making these changes. Must changes be made immediately, in the middle of the school year or later? Can the taxes, bonds, and obligations be settled that quickly? How are the bond obligations, if any, to be resolved, since the injunction against § 47 overruled the repeal of the bond liability pro rata assumption under 37-7-613? Must the County Boards of Supervisors be joined as necessary parties since that entity must assume responsibility for ongoing financial obligations? Will the federal Court, instead of State law, fashion its own procedures by which Hattiesburg could reimburse the Lamar School District for debts and expenses for, *e.g.*, the education of the school children involved? There has been no factual analysis of any of the myriad issues that come into being as a result of the District Court's latest pronouncement.

MISSISSIPPI'S SUBMISSION WAS PROPER

When the State submitted the § 47 repealer of § 37-7-611 in the Uniform School Law to the United States Attorney General in 1986, there was no requirement in effect that the State provide and/or identify pre-existing statutes as a part of its submission. The regulations of the Justice Department then in effect did not make it incumbent upon the State to identify specifically the pre-existing law when it described the new provisions of state law which were to go into effect if precleared.[8] As the District Court found, "While the text of Section 47 appeared in the notebook [submitted by the State], the texts of the 23 provisions repealed by Section 47 were not included", (App. E, p. 59a) and, "[h]ence, the State's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal school districts without requiring the consent of the school board governing the affected, annexed territory." (App. E, p. 58a).

The dissent in the three-judge district court in *Dupree II* (App. E, pp. 61a-72a) points out that this ruling exceeds the holding of *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991). The set of circumstances here presented raises questions of due process requirements for notice to submitting authorities of regulations imposed by the Department of Justice. A question is

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[8] The pertinent regulations are now changed, the old – 28 C.F.R. 51.25(b) are supplanted by the new 28 C.F.R. 51.27(b) (1987) providing that a copy of any repealed statute should be included with the Section 5 submission of the repealing legislation.

presented as to whether the Justice Department should be estopped from applying regulations other than those in effect when the submission was first made.[9] Additionally, this ruling below raises questions of retroactive application of civil rights rules. *Compare, Landgraf v. USI Film Products, Inc.*, ___ U.S. ___, 114 S.Ct. 1483 (1994) with *Powell v. Nevada*, 114 S.Ct. 1280, 1994 U.S. LEXIS 2655, 128 L.Ed.2d 1, 62 U.S.L.W. 4203 (1994). It would be appropriate to remand this case for consideration of the retroactive application of Justice Department regulations.

The impact of the three-judge court's ruling would be to require the submitting authority not only to anticipate regulatory changes, but also to anticipate the impact of a new state statute on future voting, including voting at county and municipal locations subject to independent § 5 review. There is nothing in *Clark v. Roemer, supra*, which requires or addresses this result. There is a question as to what is the proper geographic focus for a voting rights claim, that is, whether a statewide overview or a geographically compact denomination of minority interests is correct. This issue was raised but not resolved in *Johnson v. De Grandy*, 794 F. Supp. 1076; 815 F. Supp. 1550 (N.D.Fla. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2410, 124 L.Ed.2d 634 (1993), *aff'd in part and rev'd in part*

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[9] The Justice Department states its view in opposition to retroactivity at 28 C.F.R. 51.54(b)(2): "The Attorney General will make the comparison based on the conditions existing at the time of the submission."

on other grounds, ___ U.S. ___, 114 S.Ct. 2647, 127 L.Ed.2d 2775 (1994).

The United States Supreme Court should determine in this case the appropriate range for a § 5 submitting authority.

THE BURDEN OF PROOF MUST SHIFT TO THE UNITED STATES ATTORNEY GENERAL

This Court decided *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), to establish the point at which the burden of proof would shift in civil rights employment suits brought under Title VII. The Court and the parties needed to know who would bear the burden of going forward or the burden of persuasion.

In 1986 and thereafter, uncertainty developed in § 5 of the Voting Rights Act as to whether the State continued to bear the burden of proof after it had submitted its proposed new legislation for preclearance. The law required the Attorney General to request additional information, or object, if not satisfied with the submission. Much of the confusion in this case has developed because the Justice Department did not request further information, and did not clearly object. Instead, the United States Attorney General sent what appeared to be its boilerplate preclearance letter. Nowhere did that letter unambiguously identify the voting changes to which the Justice Department had objection, neither did it request further information. To use *St. Mary's* as a parallel, the Justice Department not only did not identify a reason for its objection, it did not identify the objection itself. The

State, having identified its new Uniform School Law, had received what appeared to be a preclearance letter rather than an objection or request for more information from Justice. It was this lack of clear statement from the United States Attorney General which led to the three-judge district court's decision in *Dupree I*, 776 F. Supp. 290 (S.D. Miss. 1991) that, because the United States Attorney General had not objected, § 47 was precleared.

Although the three-judge district court did not abide by that result in its more recent decisions, the confusion which has been produced throughout this case, is more the product of the ambiguity of the Justice Department's transmittal than the fault of any concealment of information on the part of the State. The Justice Department should be clear and understandable in its response to § 5 submissions. It would be helpful to all parties, in this and other cases, to have clearly delineated the burdens of proof, so that such confusion can be avoided in the future.

THE DISTRICT COURT ERRED IN CONSTRUING ITS DUTIES UNDER § 5 OF THE VOTING RIGHTS ACT WHEN IT REFUSED TO ACCEPT EVIDENCE AND ADDRESS A REMEDY THAT WOULD AFFECT VOTING.

The three-judge district court rejected the opportunity to accept evidence and ruled on this case by summary judgment, as a matter of law. (Order, App. B, p. 9a). It did make critical fact findings however, such as its finding that a prediction of white controlled city and school district elections was correct. The Court refused to accept proof as to how to fashion an appropriate remedy.

This ruling below leaves the parties in doubt as to how to hold elections.

Brooks v. Georgia Board of Elections, held that a three-judge court has limited discretion to fashion an appropriate remedy in a § 5 action, 790 F. Supp. 1156 (S.D.Ga. 1990). The *Brooks* decision highlights a split of authority in the courts below regarding the scope of the remedial powers of a three-judge district court in a § 5 voting rights case. For example, *Dotson v. City of Indianola*, 521 F. Supp. 934 (N.D. Miss. 1981), *aff'd*, 455 U.S. 936, 102 S.Ct. 1424, 71 L.Ed.2d 646 (1982), held that the appropriate remedy must be tailored to affect voting and not geographic territory, by refusing to de-annex unprecleared annexed territory but enjoining the annexed citizens from voting in city elections.

Does the court below possess jurisdiction under § 5 to carve up the Lamar County School District, as the Hattiesburg School District plaintiffs demand? It would be appropriate to remand this case for further consideration for the fashioning of an appropriate remedy.

THE PLAINTIFF MEMBERS OF THE HATTIESBURG MUNICIPAL SCHOOL DISTRICT LACK STANDING; THEY PRESENT NO COGNIZABLE INJURY UNDER § 5 OF THE VOTING RIGHTS ACT

To find § 5 jurisdiction, the Court below had to find changes in voting practices and procedures. In *Dupree I*, the District Court held that § 47 of the Uniform School Law resulted in a class of city voters who did not reside in the city school system, but who did participate in city

elections, which led to the appointment of the school district members, thereby indirectly affecting the vote.[10]

However, enjoining § 47, on the city school board's own argument, brings about an automatic extension of the school district boundaries to be coterminous with the city limits. The result is that the same class of voters, presumably white, who will now reside in both the city and the school district, still vote in the city elections, still elect those who appoint the school board, and so still dilute minority voting strength.

This Court recently stated that the dimension of a governing authority "is a 'standard, practice, or procedure with respect to voting' " because it "increases or diminishes the number of officials for whom the electorate may vote," *Holder v. Hall*, ___ U.S. ___, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994), p. 2588 (O'Connor, J., concurring) because "this change bears 'on the substance of voting power' and has 'a direct relation to voting and the election process.' " (internal cites omitted), *Id.*, p. 2620 (Blackmun, J., dissenting). As this Court has defined standing in the voting rights context: "unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Ibid.* (O'Connor, J., concurring).

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[10] See discussion of changes affecting voting in *Dupree II*. (App. E, p. 41a). Notice that the sections quoted in *Dupree II* make reference to "voting" in every clause; (App. E, p. 45a); there is no mention of indirect impact upon appointive officers, a point discussed more fully *infra*.

The Plaintiff Hattiesburg School Board should not have standing to seek the very dilution of minority voting strength which gives rise to § 5 jurisdiction in this matter.

THE DISTRICT COURT HAS CREATED AN IMPENDING COLLISION BETWEEN THE VOTING RIGHTS ACT AND THE FOURTEENTH AMENDMENT

In *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), the United States Supreme Court determined that white citizens have standing under the Fourteenth Amendment to challenge a voting rights remedy, and similarly, considered and remanded *Louisiana v. Hays*, 839 F. Supp. 1188 (three-judge court, W.D.La. 1993), *judgment vacated and case remanded sub nom. U.S. v. Hays*, ___ U.S. ___, 115 S.Ct. 2431, 1132 L.Ed.2d 635 (1995).

In the past, issues raised by the case here at bar have not found themselves subject to relief under the Fourteenth Amendment, but rather have been at the dividing line at which the courts would not recognize Fourteenth Amendment relief. There are three areas which serve as examples. First, the appointment, as opposed to the election, of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of a *Reynolds v. Sims*[11] "one person, one vote" inquiry. *Sailors v. Board of Education of Kent County*, 387 U.S. 105 (1967). In *Sailors*, "one person, one vote" relief was denied where a county board of education was basically appointive rather than elected, and there was some discussion that

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[11] 377 U.S. 533 (1964)

the board was fundamentally more administrative than legislative.[12] Second, a city has been held warranted under the Fourteenth Amendment in extending its boundaries for certain purposes[13] without assuming responsibility for all public functions. *Holt Civic Center v. Tuscaloosa*, 429 U.S. 60 (1978). Similarly, it may be noted that in *Town of Lockport v. Citizens for Community Action*, the United States Supreme Court stated that "A proposal that several school districts join to form a consolidated unit could surely be subject to voter approval in each constituent school district," 430 U.S. 259, 271 (1977). Under these Fourteenth Amendment cases, it appears that the boundary disputes here at issue would be beyond the reach of the Equal Protection Clause. Third, *Milliken v. Bradley*, 418 U.S. 717 (1974) has generally prevented equal-protection challenges being raised across school district lines.

Given these developments in the case law, an issue exists as to whether the United States Justice Department can claim § 5 statutory coverage under the Voting Rights

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[12] For a recent discussion touching on executive versus legislative function as a determining element for voting rights act coverage, *see Holder v. Hall, supra*, 114 S.Ct. at 2623 (Blackmun, dissenting, joined by Justice Stevens, Justice Souter, and Justice Ginsburg).

[13] The certain purposes recognized were that the city could extend its (1) police, (2) sanitary, and (3) business licensing powers to individuals living within 3 miles of the city's corporate boundaries, meeting a rational basis test under the Fourteenth Amendment.

Act for a change affecting district boundaries for appointed school board members. Allowing the Justice Department a broader sweep through its § 5 powers will put it on a collision course with private claims brought under the Fourteenth Amendment.

THE RULING BELOW WAS CONTRARY TO *PRESLEY V. ETOWAH COUNTY COMMISSIONERS*

Is a certain portion of Mississippi's Uniform School Law, the repealer of § 37-7-611, § 47 of the Uniform School Law, subject to preclearance procedures of § 5 of the Voting Rights Act when it affects district boundaries of an appointed school board and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah County Commissioners*, 502 U.S. 491, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)? The Court in *Dupree I* found § 5 applicable on the basis of an "indirect" effect on voting. The District Court below recognizes that the school district is not itself an elective body in Hattiesburg, Mississippi. The Board is appointed by the elected Hattiesburg Board of Aldermen. In *Presley v. Etowah County Commissioners, supra*, the United States Supreme Court held that changes in the appointive powers of elected officials are not subject to the Voting Rights Act.

There is, additionally, a conflict among the circuits in determining when particular political expression or organization constitutes "voting." Previously, for example, the Tenth Circuit had held that espousing or appointing a particular political viewpoint through the signing of an

initiative was not "voting" within the meaning of the Voting Rights Act of 1965. *Montero v. Mayer*, 861 F.2d 603 (10th Cir. 1988), *cert. denied*, 492 U.S. 921 (1989). The ruling from the three-judge district court cannot be reconciled with these prior decisions.

CONCLUSION

This case raises many problems because it attempts to apply the Voting Rights Act at cross purposes with the congressional intent behind that civil rights legislation. The Plaintiffs/Appellees, Hattiesburg School District, are not the disenfranchised, under-represented and poor, as the civil rights acts presume. These Plaintiffs/Appellees are the appointed members currently serving under an elected and serving city government. The Plaintiff city school district is not seeking to maximize minority voting strength, but to dilute it.

Just as the attorneys' fees provisions of the civil rights statutes are not designed to provide fees to defendants acting under color of state law, neither are the substantive provisions of the civil rights statutes intended to secure political advantage for municipal governments in ongoing turf battles. There is a risk that the three-judge district court's opinion below, left uncorrected, would lead to the future use of the Voting Rights Act as a common weapon in the arsenal of local politicians, rather than bringing about the equalization of

political representation, as was the intent of the Voting Rights Act.

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No. 95-1623 and No. 95-1624

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MIKE MOORE, *et al.*,

Appellants,

v.

JOHNNY DUPREE, *et al.*,

Appellees.

LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, *et al.*,

Appellants,

v.

JOHNNY DUPREE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

Whether the District Court properly applied Clark vs. Roemer, 500 U.S. 646 (1991), in holding that the Attorney General did not preclear under § 5 of the Voting Rights Act a voting change that the State of Mississippi failed to identify with specificity in its submission of other voting changes.

Whether the District Court properly exercised its remedial powers in a § 5 action by enjoining the enforcement of an unprecleared voting change until the State complies with the Voting Rights Act.

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No. 95-1623 and No. 95-1624

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Appellees.

MOTION TO AFFIRM

Pursuant to Rule 18.6, the Appellees move to affirm the judgment of the District Court because the questions are so insubstantial that further argument is unnecessary. The District Court's decision is based on well-established precedent and presents no conflict or issue of statutory interpretation that requires resolution by the Court.

STATEMENT OF THE FACTS

A. Introduction

Since 1926, Mississippi law required that the boundaries of a city school district be, at a minimum, coterminous with its parent city. Thus, residents of a city were always residents of the city school district. These residents elect the city council, which in turn appoints the members of the school board for the city school district. The State of Mississippi attempted to change this policy in 1986 by repealing Miss. Code Ann. § 37-7-611, which provides that when a city annexes territory the boundaries of the city school district automatically expand to encompass the territory annexed by its parent city.[1]

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[1] In 1977 and 1978, the State of Mississippi attempted to create an exception to § 37-7-611 by amending Miss. Code Ann. § 21-1-59. These amendments provided that extension by annexation of a city's boundaries across a county line would not affect the boundaries of the adjacent county school district unless the county school district consented to allow the annexed area to be included in the city school district. J.S. App.43a-44a.

In 1991, the District Court granted summary judgment in favor of the Appellees on their claim that the 1977 and 1978 amendments to § 21-1-59 are not enforceable because they were never precleared by the Attorney General. Dupree vs. Mabus, 776 F. Supp. 290, 303-04 (S.D. Miss. 1991) (Dupree I), vacated and remanded on other grounds sub. nom, Dupree vs. Moore, 503 U.S. 930 (1992). No cross-appeal of this portion of the District Court's judgment in Dupree I was filed. No issue related to the enforceability of the amendments to § 21-1-59 is before the Court.

As a result of the repeal of § 37-7-611, residents of an area annexed by a city would not necessarily be residents of the city school district; they could remain residents of the county, or suburban, school district. This fundamental alteration of the long standing policy in Mississippi created an anomaly in voting. The newly annexed residents continue to elect directly the board members of their county, or suburban, school district, and at the same time indirectly select the board members of the city school district by participating in city council elections.

The repeal of § 37-7-611, as well as the amendments to § 21-1-59, limited the expansion of the Hattiesburg School District when its parent city expanded by annexation into neighboring Lamar County in 1979, 1981, 1982, 1985 and 1989 and into Forrest County, where the City of Hattiesburg is primarily located, in 1989. Because of these laws, the Hattiesburg School District did not expand to include the suburban property annexed by the City.

B. Procedural History of Dupree

The State of Mississippi enforced the repeal of § 37-7-611 and the amendments to § 21-1-59 despite not gaining preclearance as required by the Voting Rights Act. In February 1990, the Appellees, individually as residents and registered voters of the City of Hattiesburg and in their official capacities as members of the school board of the Hattiesburg School District, filed this action under § 5 of the Voting Rights Act against the State of Mississippi. The Appellees sought declaratory and injunctive relief to halt enforcement of the laws. After the three-judge court convened, the Lamar County and Forrest County school districts and their school boards intervened as Defendants. In both school districts, board members are elected directly

by the residents of the county school district. Miss. Code Ann. §§ 37-5-1, -3.

In its first opinion in this litigation, the District Court held that the repealer of § 37-7-611 had been properly submitted to and precleared by the Attorney General in 1986. Dupree vs. Mabus, 776 F. Supp. 290, 303 (S.D. Miss. 1991) (Dupree I). The Court vacated Dupree I and remanded for reconsideration in light of Clark vs. Roemer, 500 U.S. 646 (1991). 503 U.S. 930 (1992).[2]

On remand, the District Court held that, when measured by the principles outlined in Clark, the repealer of § 37-7-611 had not been precleared. The State did not specifically identify the voting change effected by the repealer in its 1986 submission of other voting changes. Dupree vs. Moore, 831 F. Supp. 1310, 1317 (S.D. Miss. 1993) (Dupree II).

After the District Court issued Dupree II, the Appellants filed motions that tolled the time for appeal. Before the District Court ruled on these motions, the Appellants filed an appeal to this Court. The Court dismissed the appeal for lack of jurisdiction on January 18, 1994. 127 L. Ed 2d 69 (1994).

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[2] Shortly before the District Court decided Dupree I, the Mississippi Supreme Court addressed the preclearance of the repealer of § 37-7-611 in Greenville Public Sch. Dist. vs. Western Line Public Sch. Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 117 L. Ed. 2d 649 (1991). The state supreme court ruled that even if the repealer of § 37-7-611 was not precleared, another section of the Uniform School Law (§ 52) implicitly repealed § 37-7-611.

The District Court denied the motions on April 13, 1994, and the Appellants again filed an appeal. J.S. App. 79a. The Court vacated Dupree II and remanded for clarification of the remedy. 131 L. Ed 2d 550 (1995); see J.S. App. 81a. On remand, the District Court held that it intended to enjoin both the implicit and explicit repeal of § 37-7-611. Dupree vs. Moore, No. H90-0043(W) (S.D. Miss., Dec. 29, 1995) (Dupree III). J.S. App. 1a. The Appellants filed a notice of appeal after the District Court denied their post-judgment motions. J.S. App. 93a.

C. Submission Histories of the Uniform School Law and the Repealer of § 37-7-611

The focus of this appeal -- the status of the repeal of § 37-7-611 -- requires a review of the submission histories of the Uniform School Law (USL) and the repealer of § 37-7-611. In 1986, the Mississippi Legislature passed the USL, a sweeping act affecting a wide range of topics. This Law consisted of 203 sections and repealed, enacted or amended more than 300 separate statutes. Section 47 of the USL repealed § 37-7-611 and twenty-two other statutes that dealt with "the creation and operation of municipal separate school districts." J.S. App. 171a.

Section 52 of the USL amended Miss. Code Ann. § 37-7-103. Prior to 1986, § 37-7-103 permitted a county board of education to abolish the boundaries of any school district in the county except a city school district. With the consent of the city school district, the county board of education could add to the city school district any part of the county adjoining the city school district or detach territory from the city school district and merge it into the county school system. Section 37-7-103 now provides that any

school district has authority to alter its boundaries by agreement with an adjoining district. J.S. App. 172a-173a.

The State submitted the USL to the Attorney General for preclearance on July 22, 1986. J.S. App. 128a. The submission consisted of a one-page cover letter, a thirteen-page document containing information arranged in accordance with the Department of Justice regulations governing § 5 submissions and a 467-page looseleaf booklet titled "Senate Bill 2117 - Comparison of Current Law and New Law," which contained the typed version of the bill interspersed with photocopied pages of the then-current statute amended by particular sections of the USL. J.S. App. 143a-202a.

The one-paragraph "Introductory Note" to the looseleaf booklet states that it provides "on a section by section basis each section of the current law which has been amended followed by each individual section of" the USL. J.S. App. 143a. Thus, the State did not provide the Attorney General with a comparison of the prior law with the proposed law if the prior law was repealed.[3]

In 1986, § 51.25(a) of the regulations governing § 5 submissions to the Attorney General required that a copy of the enactment embodying the voting change be provided. J.S. App. 90a. In addition, § 51.25(b) stated that if the voting change was not "readily apparent on the face of the

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[3] The Note also indicates that if a section of the Law creates "new law then only those particular sections will be denoted with no comparison of current law." J.S. App. 143a. The Appellants are incorrect when they state that the notebook "compared each section of the [USL] with prior law." J.S. No. 95-1623, p.5.

document provided under" § 51.25(a), the submission must contain "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting." J.S. App. 90a. The regulations did not require the submitting jurisdiction to provide a copy of the prior law being repealed or amended.

The State characterized its submission as follows:

> This submission is cited as the "Mississippi Uniform School Law of 1986" and is submitted to the Attorney General of the United States in its entirety. . . . For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review. [J.S. App. 131a.]

The State specifically identified in the submission only thirteen of the 203 sections of the USL. J.S. App. 131a-137a. Section 47, which repealed § 37-7-611, was neither identified nor referred to anywhere in the thirteen-page submission. The brief text of § 47 does appear, without explanatory comment by the State, in a copy of the USL and in the looseleaf booklet supplied to the Attorney General. J.S. App. 171a. Section 52, which amended § 37-7-103, was one of the thirteen sections specifically identified and discussed in the submission. J.S. App. 133a.

In explaining § 52, the State specifically identified an amendment to § 37-7-103 that permits any school district to alter its boundaries by consent of the adjoining school

district. This voting change was precleared in 1986. The discussion of § 52 consisted of a paraphrase of the then-current statute and the amended version. The discussion made no mention of § 47 or § 37-7-611 and did not refer in any way to the State's long standing policy, reflected in § 37-7-611, of automatically extending a city school district's boundaries after an annexation by its parent city. The State did not say, or even suggest, that § 52 was designed to replace the policy reflected in § 37-7-611. The unidentified, and therefore unprecleared, voting change effected by the amendment to § 37-7-103 was the implicit repeal of the provision in § 37-7-611 that automatically extended a city school district's boundaries to include the territory annexed by its parent city in an adjoining county school district. Thus, the voting change effected by § 52's implicit repeal of § 37-7-611 was not identified in the State's submission.

The Attorney General responded to the State's submission on August 29, 1986. He did "not interpose any objection to the voting changes occasioned by [the USL], as identified in your July 22, 1986, letter." J.S. App. 203a. (emphasis added). The voting change effected by the repeal of § 37-7-611 was not specifically identified in the submission and was not precleared. The State acknowledged that the status of § 37-7-611 remained unclear after the Attorney General's response, J.S. App. 238a, and conceded in the District Court that the State's July 1986 submission contributed to the uncertainty. Memorandum in Support of State Defendants' Motion to Dismiss, p.8.

In formal recognition of the absence of preclearance, the State submitted § 47 to the Attorney General on December 30, 1987. J.S. App. 205a. In its submission of § 47, the State conceded that the entire USL was not precleared by the Attorney General. See, e.g., id. 208a

("The major part of [the USL], as it deals with the Voting Rights Act . . . has already been precleared."); id. 211a ("[M]ost of" the USL has "already been precleared by the "Justice Department.); id. ("[S]ubstantive parts of" the USL were "precleared by the Justice Department."). The State also acknowledged that this voting change was being enforced at the time of the submission. Id. 210a.

On January 27, 1989, the State responded to the Attorney General's request for additional information concerning the repeal of § 37-7-611. The State again acknowledged that the Uniform School Law had not been precleared in its entirety in 1986. J.S. App. 222a. Moreover, the State admitted that § 47 had not been specifically identified in the earlier submission of the USL:

> On July 22, 1986, the State of Mississippi submitted [the USL] for preclearance under Section 5 of the Voting Rights Act. On August 29, 1986, [the USL] was precleared under Section 5 as to the particular sections identified in our July 22, 1986 submission.
>
> On December 30, 1987, the State of Mississippi submitted [the repealer of § 37-7-611] since [it] was not specifically identified in our original submission. [J.S. App. 221a (emphasis added).]

The Attorney General interposed an objection to the repeal of § 37-7-611 on March 31, 1989.[4]

On January 12, 1990, the State sought reconsideration of the Attorney General's limited preclearance of the USL or, alternatively, the objection interposed to the repeal of § 37-7-611. J.S. App. 234a. The State contended for the first time that the entire USL had been submitted and precleared in 1986. J.S. App. 235a-236a. On May 25, 1990, the Attorney General rejected the State's position because it "appear[ed] to seriously misconstrue the structure, purpose, and history of the preclearance requirement." J.S. App. 265a. Section 5 "plainly fixes the responsibility for identifying voting changes on the state, not the . . . Attorney General, yet the state appears to be arguing . . . that the Attorney General should have uncovered voting changes of which the state itself seemingly was unaware at the time the prior submissions were made." J.S. App. 266a.

In Dupree I, the District Court concluded the 1986 repealer of § 37-7-611 had been adequately identified in the State's submission of the USL and, therefore, precleared by the Attorney General when he did not interpose an objection within 60 days. J.S. App. 29a-38a. The Appellees in the

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[4] The Attorney General concluded the repeal of § 37-7-611 would likely "create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." The State did not provide a rationale for the creation "of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently than white voters." J.S. App. 232a.

current appeal filed an appeal of that portion of the District Court's judgment in Dupree I.

The Court vacated and remanded Dupree I in light of its decision in Clark vs. Roemer, 500 U.S. 646 (1991), which emphasized a state's obligation to identify with specificity each voting change for which it seeks preclearance. On remand, the District Court ruled in Dupree II that

> Mississippi's 1986 submission is precisely that circumstance condemned by Clark vs. Roemer. Should this court permit Mississippi to submit a haystack of documents and obligate the Attorney General to painstakingly search for any voting change needle, as Mississippi has done here, this court would be ignoring Clark's clear pronouncement that a State must "identify with specificity each change that it wishes the Attorney General to consider" in a § 5 submission. [J.S. App. 60a.]

As a result, the District Court held the repealer of § 37-7-611 to be ineffective and unenforceable until Mississippi obtains administrative or judicial preclearance. J.S. App. 60a-61a. Regarding § 52, the District Court held that, "even if § 52 in effect amounted to a repeal of § 37-7-611 by operation of law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 58a-59a.

The Appellants filed an appeal of Dupree II. The Court remanded for clarification of the scope of the District Court's remedy. The question posed by the Court was

whether the District Court enjoined only § 47 of the USL or whether it also enjoined § 52 of the USL insofar as it implicitly repealed § 37-7-611. J.S. App. 81a. On remand, in Dupree III, the District Court made clear that in addition to enjoining the express repeal of § 37-7-611 by § 47, it also intended to enjoin § 52 insofar as it implicitly repealed § 37-7-611. J.S. App. 4a-5a. The District Court enjoined the explicit and implicit repeal of § 37-7-611 for the same reason. The State failed to identify with specificity the voting change effected by the repeal of § 37-7-611.

ARGUMENT

The issues in this appeal concern the District Court's interpretation of § 5 and the scope of the remedy issued by the court.

A. The District Court's interpretation of § 5 of the Voting Rights Act is consistent with decisions of the Court and the objectives of the Act.

The District Court's decision is a straightforward application of Clark vs. Roemer. The holding that the State failed to identify with specificity the voting change for which it sought preclearance does not depart from the Court's precedent or create a conflict with a decision from another circuit. The decision does not undermine the process for administrative preclearance because the Justice Department's position prevailed in the District Court. The District Court's decision is so obviously correct that it should be summarily affirmed.

The argument advanced by the Appellants and the dissenting judge in Dupree II would significantly reduce the responsibility of jurisdictions covered by the Voting Rights

Act to identify clearly the voting changes submitted to the Attorney General for preclearance. The relaxation of that burden on submitting jurisdictions would "subvert the efficacy of administrative preclearance under § 5." Clark vs. Roemer, 500 U.S. at 655. Ultimately, the purpose envisioned by Congress for administrative preclearance -- providing states with an expeditious method of having nondiscriminatory voting laws implemented without undue delay -- would not be served.

Since Allen vs. State Bd. of Elections, 393 U.S. 544 (1969), the Court has interpreted the Voting Rights Act to require that a state submit its voting changes to the Attorney General in an "unambiguous and recordable manner." Id. at 571; see United States vs. Board of Comm'rs, 435 U.S. 110, 136 (1978) ("the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him"). The regulations governing § 5 submissions have always contained a similar requirement. City of Rome vs. United States, 446 U.S. 156, 169 n.6 (1980).

In McCain vs. Lybrand, 465 U.S. 236 (1984), the Court provided direction on this issue, and the principles articulated there were reaffirmed in Clark vs. Roemer.

> We made clear [in McCain] that the submission of legislation for administrative preclearance under § 5 defines the scope of the preclearance request. Under normal circumstances, a submission pertains only to identified changes in that legislation. We established also that any ambiguity in the

> scope of a preclearance request must be resolved against the submitting authority.

Clark, 500 U.S. at 656 (citations omitted). In reversing the district court's holding that the Attorney General's preclearance of certain identified voting changes constituted preclearance of other related but unidentified voting changes, the Court in Clark reiterated the importance of specificity in the state's submission: The state "must identify with specificity each change that it wishes the Attorney General to consider." Id. at 658. The Court also reaffirmed the presumption established in McCain that the Attorney General will review only the voting changes specifically described in the state's submission. Id. at 657.

Guided by of Clark, the District Court in Dupree II correctly held that the State did not properly submit the repealer of § 37-7-611 to the Attorney General in 1986 when it submitted other voting changes. The submission of the Uniform School Law in 1986 did not contain an explanation of the process by which city school district boundaries automatically expand to encompass territory in an adjacent school district after an annexation by its parent city. Nor did the 1986 submission indicate that this process was repealed by § 47 of the USL. Moreover, the submission is utterly silent about any voting change effected by the repeal of § 37-7-611.

The Appellants contend the discussion of § 37-7-103 in § 52 of the State's submission put the Attorney General on notice that this statute was designed to replace the automatic extension policy of § 37-7-611 and serve as the sole method of altering school district boundaries. The State, however, did not identify the amendment of § 37-7-103 in this manner in the submission. The discussion of § 37-7-103, as

amended, reveals only that any school district could voluntarily agree with any other school district to a revision of the boundaries of the districts. J.S. App. 133a. The State did not indicate that the amended version of § 37-7-103 implicitly repealed § 37-7-611. Thus, the Appellants' position is contrary to Clark: "A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices." 500 U.S. at 658 (quoting McCain).

The Appellants also point to the statements that the USL was submitted "in its entirety" and that "the complete act is submitted for review." J.S. App. 131a. The use of these phrases, they argue, made the submission unambiguous. These phases do not identify any voting change, much less suggest that the State intended § 37-7-103 to replace § 37-7-611. As the Solicitor General noted in the appeal of Dupree I, it is doubtful the State "intended to submit the Uniform School Law 'in its entirety,' since most of its 203 sections have nothing to do with voting." Br. p.17 n.13. A statement that voluminous legislation is submitted "in its entirety" does not satisfy Clark's requirement that a state clearly identify each voting change in its submission.

The Appellants contend that the bare citation in the looseleaf booklet of § 37-7-611 and twenty-two other statutes dealing with the creation and operation of city school districts suffices for a proper submission of the voting change effected by the repeal of § 37-7-611. In other words, the Appellants suggest that, although the State did not identify or explain the automatic extension policy in § 47 or elsewhere in the submission, the Attorney General should have understood that the State intended to change this policy

by including § 37-7-611 in a list of repealed statutes in § 47. Their argument is plausible only if the Attorney General was duty bound to retrieve, review and study the more than one hundred statutes, including § 37-7-611, listed without elaboration as having been repealed in the 1986 submission.

The Court in Clark vs. Roemer expressly rejected the view of § 5 pressed by the Appellants. A state's obligation to identify with specificity each voting change is not a favor bestowed on the Attorney General. Noting the thousands of voting changes reviewed annually by the Attorney General, Clark requires that, before a state's voting change can be enforced, the state must "identify, submit, and receive approval for" the change. 500 U.S. at 658. Requiring the Attorney General to conduct independent research to determine whether a submission contained unidentified voting changes "would add to the Attorney General's already redoubtable obligations." Id.

Today, virtually all voting changes are submitted to the Attorney General for preclearance because of the cost and time constraints in litigating in the District of Columbia District Court. By allowing for administrative preclearance, however, "Congress in no way intended that the substantive protections of § 5 be sacrificed in the name of expediency." McCain, 465 U.S. at 246. Under either method of preclearance, the covered jurisdiction bears the burden of proving that the change in voting does not have a discriminatory purpose or effect, and in both instances "federal officials are confronted with the same 'difficult substantive issue.'" Id. at 247 (quoting Allen, 393 U.S. at 558). In the light of the reliance on administrative preclearance, Clark emphasized the necessity that the State identify each change so the Attorney General can perform her duties under § 5. 500 U.S. at 658.

The Appellants' position would permit a state to claim that the submission of an act is complete and unambiguous, even without specifically identifying each voting change sought to be reviewed, as long as the State includes the catch-all phrase "the complete act is submitted for review." In response, the Attorney General would likely interpose an objection rather than risk approving a discriminatory voting change not identified in the submission but otherwise a part of the "complete act" submitted for review. This response, in turn, would delay "the implementation of validly enacted, nondiscriminatory state legislation," a primary objective of administrative preclearance. See Morris vs. Gressette, 432 U.S. 491, 503 (1977).[5] Although such a response by the Attorney General would be the most prudent exercise of her responsibilities, it "would only add acrimony to the administration of § 5." Georgia vs. United States, 411 U.S. 526, 540-41 (1973).

In the context of judicial preclearance, a covered jurisdiction could not argue that the District of Columbia District Court approved a voting change that was not identified in the complaint or litigated at trial. To hold a state to a less demanding standard in seeking administrative preclearance would render the declaratory judgment route superfluous. Cf. id. at 538 ("Any less stringent standard [for the burden of proof] might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance.").

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[5] The Appellants' reliance on Morris is misplaced. The issue presented in this appeal -- whether a voting change was properly submitted to the Attorney General -- was not present in Morris. The submission in Morris was complete and unambiguous. 432 U.S. at 502, 504 & n.19.

The Appellants also construct an argument on the regulation (§ 51.35) in effect in 1986 that required the Attorney General to request additional information if he considered the State's July 1986 submission to be incomplete. J.S. App. 92a. The Appellants' position is wrong for two reasons. First, the Appellants presume the Attorney General considered the State's submission to present the entire Uniform School Law for approval. To the contrary, it is clear the Attorney General considered only the thirteen specifically identified voting changes to be before him for review. This view of the submission is confirmed by the Attorney General's August 29, 1986 response in which he referred to the "voting changes . . . identified" in the State's submission. J.S. App. 203a.

Second, the Appellants' reliance on the lack of a request for additional information reflects a flawed view of the purpose of the regulation, which allows the 60-day period for action to be suspended by a request for additional information. "The judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." Georgia vs. United States, 411 U.S. at 540. The regulation enables the Attorney General to make an informed decision by requesting additional information relevant to the changes identified in the initial submission. The regulation is not a mechanism for the Attorney General to ferret out voting changes a state neglects to identify. A state knows better than anyone what it wishes precleared and the burden of uncovering voting changes in a submission should not be, as the Appellants suggest, the responsibility of the Attorney General.

B. The remedy issued by the District Court for the State's violation of § 5 is consistent with the Court's precedent and the purposes of the Voting Rights Act.

In Dupree III, the District Court enjoined the enforcement of both the explicit and implicit repeal of § 37-7-611 until the State complies with the preclearance requirements of the Voting Rights Act. J.S. App. 4a-7a. This remedy is entirely consistent with the remedy either affirmed or mandated by the Court in prior § 5 cases, including Clark vs. Roemer, which stated: "If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." 500 U.S. at 652-53; see, e.g., Dougherty County Bd. of Educ. vs. White, 439 U.S. 32, 36 (1978); Berry vs. Doles, 438 U.S. 190, 191 (1978) (per curiam); Georgia vs. United States, 411 U.S. at 541; Perkins vs. Matthews, 400 U.S. 379, 397 (1971); Allen vs. State Bd. of Elections, 393 U.S. at 572.[6]

Clark vs. Roemer reaffirmed that the "local district court is in a better position than this Court to fashion relief, because the district court is more familiar with the nuances of the local situation." 500 U.S. at 659. (quotations

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[6] The "massive confusion" and "chaos" purportedly created by the remedy in this case is more imagined than real. See J.S. No. 95-1623 p.25. The Plaintiffs (Appellees here) did not request the District Court to modify school district boundary lines. That issue, as Forrest County and the State acknowledge, is presently before the court that oversees the Hattiesburg School District's desegregation order. See id. p.27. The Appellants are parties to that desegregation case and each has filed pleadings opposing any modification of school district boundaries.

omitted). In granting relief, the district court "should adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions." Id. at 660. The Appellants raised on several occasions in the District Court the same arguments pressed now on appeal. The District Court concluded that "the most equitable and practicable" remedy was to enjoin the explicit and implicit repeal of § 37-7-611 until the State complies with § 5.

The correctness of the District Court's remedy is confirmed by an analysis of the remedy proposed by the Appellants in the District Court. See Joint Motion for Remedy (Sept. 13, 1993), p.2. Their remedy consists of two parts. First, school district boundaries would remain as they were prior to 1990, when Dupree was filed. Second, their remedy would preclude the newly annexed residents of the City of Hattiesburg from voting in county school board elections. This suggested remedy is neither equitable nor practicable. It deprives voters in the county school district of the right to vote for county school board members who have the power, among others, to determine the amount of taxes imposed on residents of the county school district.[7] Although these residents would (i) live inside the boundaries of the county school district, (ii) send their children to the county schools and (iii) pay taxes to support the county schools, they could not, under Appellants' proposed remedy, vote in county school board elections or in county school bond elections. In addition, the Appellants' proposed remedy does not address, much less alleviate, the basis for the objection of the Attorney General to the repeal of § 37-7-

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[7] See Miss. Code Ann. § 37-57-105 (procedure for raising revenue from property taxes imposed on residents of school district).

611. The residents of the county school district would still indirectly select city school board members by participating in city elections. J.S. App. 232a.

In attacking the District Court's remedy, the Appellants emphasize the Mississippi Supreme Court's decision in Greenville Public Sch. Dist. vs. Western Line Public Sch. Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 117 L. Ed. 2d 649 (1991), which held that, even if the repealer of § 37-7-611 was not precleared, the amendment to § 37-7-103 repealed § 37-7-611 by implication under state rules of statutory construction. The Appellants contend the District Court should have deferred to the state supreme court's holding that because the amendment to § 37-7-103 was precleared, "§ 37-7-611 can no longer be given any effect, regardless of its preclearance status." No. 95-1623 J.S. p.21; see No. 95-1624 J.S. pp.7-12.

The District Court correctly rejected this "preclearance by implication" argument, holding that, "even if Section 52 in effect amounted to a repeal of § 37-7-611 by operation of state law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 59a n.10; see id. 4a-5a.[8] If the State of Mississippi desires to repeal § 37-7-611, either explicitly or implicitly, and as a result, effect a change in its voting laws, the preclearance requirements of § 5 must be satisfied,

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[8] In addition, Dupree III cited Nickles vs. Western Line Sch. Dist., No. 4:90-cv-45BO (N.D. Miss., Oct 30, 1995), a § 5 action between the same parties to the Greenville state court action. Nickles held that the state court action did not operate to preclude the federal court action because of the intervening decision in Clark vs. Roemer. Mot. App. 1a.

regardless whether the repeal arises from legislative action or by judicial decree. See Hathorn vs. Lovorn, 457 U.S. 255, 269 n.23 (1982); McDaniel vs. Sanchez, 452 U.S. 130, 153 (1981). The State's discussion of the amendment to § 37-7-103 did not identify any attendant change in the State's policy regarding the effect on school district boundaries after an annexation. Therefore, the Attorney General did not preclear the implicit repeal of § 37-7-611 by the amendment to § 37-7-103.

The Appellants' suggestion (No. 1623 J.S. App. p.21; No. 95-1624, p.12) that the District Court enjoined §§ 47 and 52 in their entirety ignores completely the basis for that court's opinions. In Dupree II, the District Court limited its opinion to the voting change effected by the repeal of § 37-7-611. "The repealer of Miss. Code Ann. § 37-7-611 is hereby found to be ineffective and unenforceable" until the State obtains judicial or administrative preclearance. J.S. App. 60a. Dupree III reaffirmed this holding. "Accordingly, we found the Section 47 repealer of § 37-7-611 to be ineffective and unenforceable." J.S. App. 3a.

Dupree II also addressed the State's failure to submit properly § 52's implicit repeal of § 37-7-611.

> Although the State's submission letter did discuss Section 52, in that portion of the submission letter the State did not discuss the repealed matter of automatic expansion. In discussing Section 52, the State merely explained the consent factor relative to alterations of school district boundaries. So, even if Section 52 in effect amounted to a repeal of § 37-7-611 by operation of state law, that fact was not submitted to the

> Attorney General in 1986 nor reviewed by him as such. [J.S. App. 58a-59a.]

In ruling that § 52's implicit repeal of § 37-7-611 should also be enjoined, the District Court in Dupree III accurately observed that "when Section 52 was submitted for preclearance by the Attorney General, the State of Mississippi did not discuss the repealed matter of automatic expansion." J.S. App. 5a. The State specifically identified only the "consent factor relative to alterations of school district boundaries." Id. As a result, "even if Section 52 repealed § 37-7-611, that fact was not submitted to the Attorney General for preclearance. Thus, we are of the opinion that Section 52 was not submitted with the specificity required by Clark vs. Roemer." J.S. App. 5a.

The Appellants' position is also contrary to Judge Barksdale's special concurrence in Dupree III. He "agree[d] that enjoining § 52 ..., insofar as it implicitly repealed § 37-7-611, is required if § 47 is to be enjoined." J.S. App. 8a. The references in Dupree III to "§ 47" and to "§ 52" do not encompass every voting change effected by them but only the repeal of § 37-7-611, the voting change the parties have been litigating for the last six years. The District Court did not address the other statutes repealed by § 47 for the simple reason that they were not challenged by the Appellees. To argue otherwise, as the Appellants now do, is disingenuous.

The Appellants claim that the preclearance of § 52 insofar as it implicitly repealed § 37-7-611 has only recently been raised and only then because "it became clear that § 52 . . . accomplished the same purpose as the § 47 repeal of § 37-7-611." No. 95-1623 J.S. p.22. This statement is incorrect. The District Court initially raised this issue in September 1990 during oral argument on the parties' motions

for summary judgment. "Upon the conclusion of oral argument, the Court specifically requested the parties to submit briefs addressing the effect of § 52 of the [USL] upon the issues of this action." Supplemental Br. of Forrest Co. Sch. Dist. (Oct. 9, 1990), pp. 3-4. The Appellees and the United States as amicus curiae have consistently maintained that the voting change effected by the repeal of § 37-7-611 could not be precleared by implication and that the implicit repeal of that statute by § 52 was not specifically identified in the State's 1986 submission. Plainitffs' Post-Argument Supplemental Br. (Oct. 10, 1990), pp.1-3; Plaintiffs' Supplemental Br. (Jan. 22, 1991), pp.3-4; Memorandum of United States as Amicus Curiae (Mar. 7, 1991), p.35; United States Amicus Curiae Br. (May 21, 1992), p.9 & n.6; Plaintiffs' Rebuttal Br. on Remand (July 2, 1992), p.3.

In summary, the District Court correctly applied Clark vs. Roemer and enjoined the State from enforcing both the explicit and implicit repeal of § 37-7-611 until the State receives either administrative or judicial preclearance. The District Court's remedy is appropriate because the State did not specifically identify this voting change in the 1986 submission of the USL. The District Court's decision is correct and further argument is unnecessary.[9]

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[9] The Appellants raise several issues concerning standing and the proper scope and application of § 5. No. 95-1624 J.S. pp.12-14, 19-26. Dupree I decided these issues against the Appellants and no appeal was taken. Moreover, the District Court's resolution of these issues does not present a substantial question.

CONCLUSION

For these reasons, the District Court's decision should be summarily affirmed.

RESPECTFULLY SUBMITTED,

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May 8, 1996

APPENDIX

APPENDIX A

FILED
OCT 30 1995
NORMAN L. GILLESPIE, CLERK
BY _____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JANICE M. NICKLES, ET AL.,
Plaintiffs

V. **NO. 4:90CV45-B-0**

WESTERN LINE SCHOOL DISTRICT, ET AL.,
Defendants

MEMORANDUM OPINION

This cause comes before the court on the issue of whether a previous state supreme court decision, Greenville Public School Dist. v. Western Line Consol. School Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 503 U.S. 950, 117 L. Ed. 2d 649 (1992) precludes this cause. During the pendency of the state court action, the defendants[1] filed a

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[1]Since the Greenville Public School District and members of the Board of Trustees of the Greenville Public School District, in their official capacities, were realigned as plaintiffs, Western Line School District and its trustees, in

(continued...)

motion to dismiss asserting, inter alia, that the court should abstain from assuming jurisdiction of identical issues and parties in the instant cause. On December 14, 1990 prior to a ruling of the motion to dismiss, on agreement of counsel, the court entered a stay order pending the disposition of an action involving the same issue of law in the United States District Court for the Southern District of Mississippi. That district court rendered a decision on April 1, 1991, Dupree v. Mabus, 776 F. Supp. 290 (S.D. Miss. 1391) [Dupree I] and on August 27, 1993 on remand, Dupree v. Moore, 831 F. Supp. 1310 (S.D. Miss. 1993) [Dupree II]. On February 24, 1994, the plaintiffs filed a joint motion to lift stay asserting that disposition of a unique issue would expedite resolution of this cause. On May 17, 1994 the court lifted the stay for the purpose of addressing the issues of res judicata and the plaintiff Nickles' standing.[2]

The defendants contend that the state court decision involving the same issues and parties precludes this cause on the ground of res judicata. Nilsen v. City of Moss Point, 701 F.2d 556, 559 (5th Cir. 1983). This cause was brought pursuant to 42 U.S.C. § 1973c, section 5 of the Voting Rights Act of 1965, as amended, seeking to enjoin the enforcement of the allegedly unprecleared § 47 of the 1986 Uniform School Law [also referred to as The Education

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[1](...continued)
their official capacities, are the only defendants. The individual plaintiffs, Janice M. Nickles, individually, and Janice M. Nickles as mother and next friend of her minor children, Jennifer R. Nickles and Kathryn R. Nickles, were dismissed by the parties' stipulation pursuant to Rule 41(a)(1)(ii).

[2]The above-referenced stipulation of dismissal of the Nickles rendered the standing issue moot.

Reform Act of 1986], repealing Miss. Code Ann. §37-7-611. "When a city annexed territory, § 37-7-611 provided that the municipal school district automatically expanded to become coextensive with the city limits." Dupree II, 831 F. Supp. at 1313. Section 52 of the Uniform School Law amended Miss. Code Ann. § 37-7-103 "to provide that, when a city annexed neighboring territory, the municipal school district would expand into any already existing school district only with the consent of the school board governing the annexed territory." Id. at 1313-14. It is undisputed that section 52 was precleared. Dupree I, 776 F. Supp. at 293.

In a declaratory judgment action alleging that certain territory annexed to the city of Greenville automatically became part of the Greenville Public School District, the Mississippi Supreme Court held that the Greenville Public School District "was not entitled to the declaratory judgment, and was properly enjoined from disturbing the status quo of the respective school districts." Greenville Public School Dist. v. Western Line Consol. School Dist., 575 So. 2d at 957-58. The court collaterally held that the repeal of § 37-7-611 was precleared, along with the remaining sections of the Uniform School Law. Id. at 965, 966. The court reasoned that the entire statutory scheme of the Uniform School Law, including section 47, was submitted to the United States Attorney General and was precleared by the absence of any objection by the Attorney General to the original 1986 submission.[3] Id. at 965.

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[3]In 1987 the State of Mississippi resubmitted section 47, the repealer of § 37-7-611, to the United States Attorney General for affirmative preclearance. After reviewing the resubmission and extensive additional information, the United States Attorney General objected to the implementation of section 47 insofar as it repealed § 37-7-

(continued...)

The plaintiffs challenge the state court's jurisdiction to decide the preclearance issue. See Hathorn v. Lovorn, 457 U.S. 255, 268-69, 72 L. Ed. 2d 824, 836-37 (1982) (even if federal courts have exclusive jurisdiction over "action[s] under" section 5, "at least when the issue arises collaterally, state courts may decide whether a proposed change in election procedure requires preclearance under § 5"). The plaintiffs contend that the Mississippi Supreme Court went beyond the collateral issue of the applicability of section 5 in deciding an issue reserved for a three-judge panel, i.e., whether the state has complied with section 5. See McCain v. Lybrand, 465 U.S. 236, 250 n. 17, 79 L. Ed. 2d 271, 282 n. 17 (1984) ("The only questions in an action alleging a violation of the § 5 preclearance requirement are (1) whether a change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate").

Assuming arguendo that the Mississippi Supreme Court had collateral or concurrent jurisdiction to adjudicate that section 47 has been precleared, the court must consider what, if any, changes have occurred since the state court's ruling. In an action challenging the constitutionality of a reapportionment plan, the Fifth Circuit stated:

> It has long been established that res judicata is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions.

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[3](...continued)
611. The Mississippi Attorney General's request for reconsideration of the objection was denied.

Jackson v. DeSoto Parish School Bd., 585 F.2d 726, 729 (5th Cir. 1978). The United States Supreme Court long ago stated the general rule that

> res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation.

State Farm Mut. Auto Ins. Co. v. Duel, 324 U.S. 154, 162, 89 L. Ed. 812 (1945), cited in Moch v. East Baton Rouge Parish School Bd., 548 F. 2d 594, 597 (5th Cir.), cert. denied, 434 U.S. 859, 54 L. Ed. 2d 132 (1977). In another voting rights action, the Fifth Circuit reasoned:

> Faced with changing law, courts hearing questions of constitutional right cannot be limited by res judicata. If they were, the Constitution would be applied differently in different locations. But '[the Constitution is not geared to patchwork geography. It tolerates no independent enclaves.'

Parnell v. Rapides Parish School Bd., 563 F.2d 180, 185 (5th Cir. 1977) (citation omitted), cert. denied, 438 U.S. 915, 57 L. Ed. 2d 1160 (1978).

Like the Mississippi Supreme Court, the court in Dupree I held that the Uniform School Law of 1986 was precleared in its entirety, including the repeal of § 37-7-611, and that the United States Attorney General's subsequent objection upon resubmission of §47 "was of no effect." 776 F. Supp at 303 (citing Morris v. Gressette, 432 U.S. 491, 53 L. Ed. 2d 506 (1977)). The court stated:

> Morris stands for the proposition that the USAG's failure to object to a complete submission is final, and any subsequent attempts to object are invalid.

776 F. Supp. at 301. The initial submission included the Act in its entirety and the cover letter stated in part:

> For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review.

The cover letter affirmatively identified and discussed only 13 of 205 sections of the Act, including section 52 amending § 37-7-103. Section 47 repealing §37-7-611 was not one of the highlighted sections in the cover letter.

Three months following the state supreme court's denial of petition for rehearing and two months following the Dupree I decision, the United States Supreme Court held that a State "must identify with specificity each change that it wishes the Attorney General to consider" for the purpose of administrative preclearance under section 5. Clark v. Roemer, 500 U.S 646, 114 L. Ed. 2d 691, 704 (1991). The pertinent issue in Clark v. Roemer was "whether the State's failure to preclear certain earlier voting changes under § 5 was cured by the Attorney General's preclearance of later, or related, voting changes." 114 L. Ed. 2d at 700. The Court held that the three-judge district court erroneously found that "the Attorney General 'expressly approved' the prior uncleared changes." Id. at 705. The Court reasoned:

> None of the submissions informed the Attorney General that prior voting changes were uncleared and were being transmitted alone with the new changes.

Id. On March 23, 1992 the United States vacated and remanded Dupree I "for further consideration in light of Clark v. Roemer." 503 U.S. 930, 117 L. Ed. 2d 609 (1992). On remand, the three-judge district court in Dupree II concluded that "Mississippi's 1986 submission is precisely that circumstance condemned by Clark v. Roemer." 831 F. Supp. at 1317. The court held:

> Upon measuring the facts sub judice by the bedrock principles enunciated by Clark,...the Attorney General's letter of August 29, 1986, wherein he stated that he did 'not interpose any objection to the voting changes occasioned by [the 1986 Uniform School Law] as identified in your [the State of Mississippi's] July 22, 1986, letter,' precleared only the specifically identified changes noted in the 13 provisions.

Id. It is clear to the court that Clark v. Roemer is an intervening decision that constitutes an exception to the doctrine of res judicata, as demonstrated in the Supreme Court's remand of Dupree I. See Dupree II, 831 F. Supp. at 1316 ("The juridical polestar which illuminates the key points of law here and leads us decisively to a solution is the case of Clark v. Roemer [citation omitted], the decision upon which the remand of this case from the United States Supreme Court is based"). Accordingly, the previous state court decision does not preclude the instant action.

As the Dupree I court noted, "a state supreme court's interpretation of a state statute is binding on a federal court." 776 F. Supp. at 298. The Mississippi Supreme Court construed §37-7-103, as amended, as repealing by implication § 37-7-611. 575 So. 2d at 963. In Dupree II, on appeal the Supreme Court invited the Solicitor General to file a brief addressing the following issue:

> In light of the Mississippi Supreme Court's holding in Greenville Public School District v. Western Line Consolidated School District, 575 So 2d 956 (Miss 1990), that Miss Code Ann § 37-7-103 (1972 & Supp 1990) supersedes Miss Code Ann § 37-7-611 (1972) and repeals it by implication, what remedy, if any, can a federal court offer for failure to preclear § 47 of the Education Reform Act, 1986 Miss Gen Laws, ch 492, which also purported to repeal 37-7-611?

130 L. Ed.2d 308 (October 17, 1994). On April 17, 1995 the Court vacated and remanded Dupree II

> to clarify whether it has enjoined only Section 47 of the Uniform School Law, 1985 Miss Gen Laws, ch 492, or whether it has also enjoined the effect of Section 52 of the Act (codified as Miss Code Ann Section 37-7-103 (1990)), insofar as Section 52 implicitly repealed Miss Code Ann Section 37-7-61L (1972).

131 L. Ed. 2d 550 (1995). Since the Dupree litigation is in an advanced stage and the three-judge court on remand has been instructed to address the effect of the binding state court ruling on the ultimate remedy to be granted, the court finds that it would be judicially inefficient to proceed with this cause. Therefore, the court will issue a stay order pending final disposition of the Dupree litigation.[4]

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[4]Final adjudication in Dupree of the enforceability of §§ 37-7-611 and 37-7-103, as amended, in the context of section 5 of the Voting Right Act will apply to all counties in Mississippi.

An order will issue accordingly.

THIS, the 27th day of October, 1995.

/s/NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

Nos. 95-1623, 95-1624

Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

MIKE MOORE, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District of Mississippi

BRIEF OPPOSING MOTION TO AFFIRM

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May 17, 1996

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Alexis Lawrence, Guardian and Next Friend on Behalf of Kemmerlyn D. Lawrence, A Minor v. Shirley S. Chater, Commissioner of Social Security, ___ U.S. ___, 116 S.Ct. 604, concurrences and dissents appearing at ___ U.S. ___, 116 S.Ct. 611, 133 L.Ed.2d 545 (1996) 1

Missouri v. Jenkins, ___ U.S. ___, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) 3

Morse v. Republican Party of Virginia, ___ U.S. ___, 116 S.Ct. 1187 (1996) 3

Presley v. Etowah County Comm'n, 502 U.S. 491, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992) 3

Anthony Leo Stutson v. United States, ___ U.S. ___, 116 S.Ct. 600 (1996) 1

U.S. v. Hays, ___ U.S. ___, 115 S.Ct. 2431 (1991) 1

STATUTES CITED

All Writs Act, 28 U.S.C. § 1652 2

Several issues are ignored, and others not adequately addressed, by the Motion to Affirm.

Standing is jurisdictional, may be raised at any time, and intervening decisions from this Court, particularly *U.S. v. Hays*, ___ U.S. ___, 115 S.Ct. 2431 (1991), also merit a revisitation of the standing conundrum presented by the facts of this case. Standing is not decided by way of law of the case in this instance because earlier decisions have been vacated.

The fact that prior decisions have been vacated becomes of paramount importance if the injunction against the repealer of 37-7-611 is overturned, only to reappear under the guise of a ruling from *Dupree I*. Rulings from *Dupree I*, on the attempts by the Mississippi legislature to grant veto power to adjacent county school boards, enacted in 1977 and 1978, were not specifically addressed on appeal when this case came before the Court in 1991. The interpretations of the 1977 and 1978 amendments § 21-1-59, as variously amended since then, which address the same expansions of municipal boundaries as the repealer to 37-7-611 and § 52 of the Uniform School Law, have not been before this Court and are neither decided by this Court nor law of the case. The prior decisions in this action, including the District Court's holding in *Dupree I*, are vacated. *See, Anthony Leo Stutson v. United States*, ___ U.S. ___, 116 S.Ct. 600 (1996); *Alexis Lawrence, Guardian and Next Friend on Behalf of Kemmerlyn D. Lawrence, A Minor v. Shirley S. Chater, Commissioner of Social Security*, ___ U.S. ___, 116 S.Ct. 604, concurrences and dissents appearing at ___ U.S. ___, 116 S.Ct. 611, 133 L.Ed.2d 545 (1996) (applying the term "vacate" in GVR orders).

The All Writs Act, 28 U.S.C. § 1652, is not addressed by the Motion to Affirm. Without direction designed by this Court, however, the All Writs Act is an engine of judicial power that proceeds outside all compass. The interplay of state and federal judicial power is too important to let go by some unspecified dead reckoning.

The Motion to Affirm quotes without comment the statement from the three-judge court below that, "even if § 52 in effect amounted to a repeal of § 37-7-611 by operation of law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." Motion to Affirm, p. 11. It was not the burden of the submitting jurisdiction, under the regulations then existing, or now, to inform the Attorney General of the legal framework under which the Section 5 analysis is to take place. The burden was on the Attorney General to request more information within the statutory time limits, if legal issues did exist. In this case, the Attorney General did not request more information. The Justice Department affirmatively granted preclearance of § 52. No case before this one has even before retroactively denied preclearance.

The Motion to Affirm relies on the opinion from the Northern District of Mississippi in *Nickles v. Western Line Consolidated School Dist.*, No. 4:90-cv-45-BO, that *Greenville Public School District, et al. v. Western Line Consolidated School District, et al.*, 575 So.2d 956 (Miss. 1990), is supplanted by law advanced by *Clark v. Roemer*, 500 U.S. 646 (1991), inexplicably disregarding the fact that *Greenville v. Western Line* was left intact by this the United States Supreme Court after *Clark v. Roemer* was decided. *Greenville Pub. Sch. Dist. v. Western Line Consol. Sch. Dist., supra,*

cert. denied, 503 U.S. 950, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992).

A city school district's remedial measure impacting on extraterritorial school districts was disallowed last term in *Missouri v. Jenkins*, ___ U.S. ___, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995). Here, to the contrary, a Section 5 court has determined that a city school district, to prevent change in voting laws, must take control of extraterritorial school districts. No provisions are made in a remedy to account for the manner that control is to be transferred or exercised. The State law which sets out such transfer and exercise of school powers is the very statute held not precleared, in some as yet undetermined part. The parties are left not knowing how to act to abide by the injunction, if any, of the three-judge court.

Since 1926, since before the passage of the Voting Rights Act of 1964, since before the statutory amendments in 1977 and 1978 controlling boundaries to school districts, since before and after the passage and preclearance of § 52 and the passage and non-preclearance of the repealer of § 37-7-611, whenever a city in Mississippi expanded its boundaries, the new city residents voted in the city elections. There has been no change affecting voting by the change in the school laws in Mississippi. School board members have been, and remain, appointed. There has been no change affecting voting as required for Section 5 jurisdiction. *Morse v. Republican Party of Virginia*, ___ U.S. ___, 116 S.Ct. 1187, 1215 (1996) ("There are already substantial limits as to which voting-related 'practices and procedures' must be precleared. *See Presley v. Etowah County Comm'n*, 502 U.S. 491, 502-503, 112 S.Ct. 820, 828-829, 117 L.Ed.2d 51 (1992) (gathering cases and

setting out four preclearance categories: changes involving 'the manner of voting[,] . . . candidacy requirements and qualifications[,] . . . the composition of the electorate that may vote[,] . . . [and] the creation or abolition of an elective office") (Breyer, J., with whom Justice O'Connor and Justice Souter join, concurring in the judgment).

Section 52 of the Uniform School Law says that county school districts must agree to changes of their boundaries with city school districts. The language itself is inconsistent with 37-7-611 (the repealer of which is said to be not precleared). The regulations in effect at the time of this submission did not require the identification of the prior law being changed. There was no reason, at the time, for Mississippi to make a more specific identification of the law being repealed. *Clark v. Roemer* does not change the rules in effect at the time the submission was made, and does not address the precise issue of what portion of the repealed law, if any, must be submitted. Since all of § 52 was specifically submitted, and precleared, no reading of *Clark v. Roemer* supports the result reached by the three-judge court on remand, to enjoin a previously precleared state statute.

CONCLUSION

The decision of the three-judge court on remand raises more questions than it answers. There was no clear way, under the Supreme Court Rules, for the Court below to certify one or more questions to this Court for review. The conflict between the decision of the Mississippi Supreme Court, for which certiorari was denied by this Court, and the contrary decision by the federal district

court here appealed, requires resolution by exercise of the appellate authority of this Court.

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May 17, 1996